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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: W.A. Whitney Corporation--Request for Reconsideration

File: B-227082.2

Date: September 8, 1987

DIGEST

1. Where a protester says that it wants the General Accounting Office (GAO) to consider all the issues it raised in its protest to the contracting agency, and subsequently withdraws one of them, GAO will consider all of the remaining issues whether or not they are specifically reargued.

2. Decision which is not shown to be legally or factually incorrect is affirmed on reconsideration.

DECISION

W.A. Whitney Corporation requests that we reconsider our decision in W.A. Whitney Corp., B-227082, July 7, 1987, 87-2 C.P.D. ¶ ____, in which we denied in part and dismissed in part Whitney's protest concerning the Department of the Navy request for proposals (RFP) No. N00600-87-R-1570.

We affirm the decision.

The RFP was issued on February 17, 1987, for two computer numerical control (CNC) punch presses with plasma arcs. Whitney initially filed a protest with the Navy alleging, among other things, that the RFP specifications favored a Wiedemann Magnum 5000 Punch Press. Whitney specifically complained that the agency required that the punch press be no larger than 20 feet by 20 feet, a requirement with which Whitney's punch press could not comply. After the Navy denied Whitney's protest, Whitney filed its protest with our Office.

In its protest to our Office, Whitney raised other issues, and also specifically requested that we decide the issues that were protested to the Navy. We denied Whitney's protest that the 20 feet by 20 feet space requirement was unduly restrictive because, in reply to Whitney's agency-level protest, the Navy explained that the requirement was

based on the space available for the machine, and in its comments to our Office Whitney did not dispute the agency's position or otherwise demonstrate that the position was unreasonable. Since Whitney admitted that it could not offer a machine that would comply with the space limitation, we found that Whitney was not an interested party to challenge the other alleged specification defects, and we dismissed the balance of Whitney's protest.

In its request for reconsideration, Whitney asserts that we improperly found that the firm was not an interested party to protest alleged specification defects other than the floor space requirement. To support this position, Whitney first argues that the issue of the 20 feet by 20 feet floor space limitation was not before the General Accounting Office. Whitney further avers that even if this issue initially was before our Office, Whitney abandoned it orally at the protest conference and by failing to address the issue in its comments on the Navy's protest report. Whitney concludes that our Office should not have decided this issue and used it as a basis to find that Whitney would be ineligible to receive a contract award under the solicitation. Whitney argues that, in any event, our Office incorrectly concluded that Whitney could not offer a punch press that meets the 20 feet by 20 feet requirement.

We find no merit in Whitney's request. In its protest before the Navy, Whitney stated,

> ". . . the 20' x 20' floor space requirement is totally unjustified. . . .
>
> "It is a known fact to [the Navy] that W. A. Whitney cannot comply with the 20' x 20' floor space requirement and refusal to increase the allocated floor space is being enforced to prevent us from competing against Wiedemann."

At another point in its protest letter, Whitney stated that "it is impossible to fit our machine in a 20' x 20' area . . . this requirement will render our proposal nonresponsive." In its protest to our Office, Whitney stated, "The agency, in their response to our protest has failed to answer key . . . issues," and requested "that GAO provide a ruling on the issues raised in our original protest."

If a protester advises that it wants our Office to consider all issues it previously raised in a protest before the contracting agency, we will do so whether or not the firm specifically reargues all of them, since we do not think it would be fair for our Office to decide which issues the firm probably means to continue. It therefore is incumbent on a

protester who, because of changed circumstances, subsequently decides it no longer needs to pursue one of those issues, to state as much. Further, we consider that a protester that abandons an issue has accepted the agency's position unless the firm specifically advises that other considerations have caused it to change its position.

In this case, moreover, in comments filed after the protest conference in our Office Whitney specifically abandoned one of the issues it had raised earlier (related to the appropriation used to fund the contract), but reiterated its desire that we consider whether the solicitation was unduly restrictive. Where a protester specifically abandons one issue, we do not see how our Office can be expected to assume that the protester also means to abandon any or all of the elements of another. Accordingly, we properly concluded that Whitney's protest of the space requirement was before our Office.

Whitney argues that its silence with respect to this particular space-requirements argument should have been understood by us to amount to an abandonment of the argument. As indicated above, we do not agree, but even if we were to agree that Whitney had abandoned the argument, the fact remains that in its protest to the agency, Whitney stated that it was impossible to fit its machine in an area 20 feet by 20 feet. Whitney was thus offering a nonresponsive product and therefore was not an interested party to raise any other issues in the procurement. See Sun Enterprises, B-221438.2, Apr. 18, 1986, 86-1 C.P.D. ¶ 384. For the first time in this request for reconsideration Whitney formally argues that it could have modified its equipment so as to fit within the maximum available space; that argument, however, comes far too late in the protest to be availing. If Whitney can, in fact, offer equipment that complies, Whitney should have noted that fact during the initial protest. See Western Wood Preservers Institute--Reconsideration, B-203855.8, Jan. 9, 1985, 85-1 C.P.D. ¶ 29.

Whitney alternatively asserts that, pursuant to clause L-15 of the RFP, even if the firm cannot provide a punch press that meets the 20 feet by 20 feet size limitation, the Navy could not reject an offer from Whitney. The clause provides:

> "Your machine should comply with the design, construction, capacities and operation outlined by our specifications. If your equipment does not meet the specifications exactly, submit your proposal anyway. . . . "

Whitney argues that since it could offer an alternative machine, it is not true that Whitney had no chance of receiving the award so that the firm, therefore, in fact was an interested party to protest the other alleged specification defects.

The documents submitted by Whitney indicate that Whitney clearly understood that the Navy would not accept a punch press that was larger than 20 feet by 20 feet. Further, the space limitation is not stated as a specification of the punch press. Rather, the requirement is included in a separate note in the RFP which explains that this is the maximum space available for the machine. Thus, while clause L-15 would permit offerors to propose equipment that did not precisely comply with the specifications for the punch press, we do not think the clause would permit the Navy to accept a proposal that exceeds the size limitation.

Since Whitney has not shown that our decision is legally or factually incorrect, the decision is affirmed. 4 C.F.R. § 21.12 (1987).

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel